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No. 331

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

UNITED STATES OF AMERICA,
Petitioner,

vs.

A. B. LEACH & CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

R. J. BLAIR,
GEORGE K. BOWDEN,
Attorneys for Respondent.

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OPINIONS BELOW.

The memorandum opinion of the District Court (Rec. 8) is not reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 84 Fed. (2d) at page 908.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 30, 1936. The petition for certiorari was filed in this court on the 1st day of September, A. D. 1936.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE ISSUE.

The respondent is a corporation engaged in the brokerage business. To facilitate the transfer of securities dealt in, respondent adopted the practice of taking the securities in the name of an individual instead of its corporate name. In the transactions here involved, stocks were purchased by the respondent and were taken by it in the name of one of its employees. The respondent paid one stamp tax upon this transfer. The government claims it should pay a second tax because the stock was taken in the name of an employee.

The question presented is whether or not the respondent, by acquiring this stock in the name of its employee through this single transaction, is to be subjected to two stamp taxes under the Revenue Act of 1926.

STATEMENT.

The facts are adequately stated in the government's petion and will not be restated here.

ARGUMENT.

The provision of the statute under which the government has asserted the tax is Schedule A (3), Section 800, Title VIII, of the Revenue Act of 1926, which provides for a tax of 2 cents per share on:

> "* * * *all sales*, or agreements to sell, or memoranda of sales or deliveries of, *or transfers of legal title to shares or certificates of stock* or of profits or of interest in property or accumulations of any corporation, *or to rights to subscribe for or to receive such shares or certificates.* * * *" (Italics supplied.)

1. The petitioner incorporates by reference, its argument made in the petition for certiorari in *United States* v. *Automatic Washer Company*, No. 330, October Term, stating on page 5:

> "The reasons advanced in the petition for certiorari in the *Automatic Washer* case, No. 330, are applicable to the present case."

This is done in an attempt to bring the instant case within the principles of the case of *Raybestos-Manhattan, Inc.* v. *United States*, 296 U. S. 60, advanced as a major reason to support the petition for certiorari in the *Automatic Washer* case.

Neither the *Automatic Washer* case nor the *Raybestos-Manhattan* case involved the issue presented in this proceeding. The *Raybestos-Manhattan* case involved the reorganization of a corporation, whereby the old corporation conveyed all its assets to a new corporation in return for stock in the new corporation. The stock of the new corporation was not issued to the old corporation, but instead was issued directly to the stockholders thereof. This court

held that there were two transfers of the stock; one, to the old corporation, and the other, from the old corporation to its stockholders. Both transfers were taxable.

The *Raybestos-Manhattan* case is not a nominee case. The old corporation had the right to receive the stock of the new corporation. It transferred this right and all other right, title, and interest in the stock to its stockholders. The stockholders took this stock not as nominees, but as owners. In the instant case, the nominee, Vercouter, did not acquire any right to receive the stock. The respondent did not contemplate the transfer of any right to Vercouter. The stock was merely taken in his name by the respondent.

The court below considered and dismissed the possibility that the *Raybestos Manhattan* case was applicable to the facts in the instant case and stated (Rec. 26):

> "Certainly this does not present the shortcut in transfer of interest held taxable in the case of *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60. Here there is no such shortcut, for there is no transfer either of legal title or beneficial interest."

There is no indication from the language of the *Raybestos-Manhattan* case that the principle established therein was meant to be extended to cover the situation presented in this proceeding.

The *Automatic Washer* case also involved a reorganization of a corporation whereby all the assets of the old corporation were delivered to a new corporation in exchange for stock. By previous contract, the stockholders had agreed that a part of the stock of the new corporation should be transferred to one Nelson, who was vested with a power of attorney to execute a sale of that part of the stock to a group of bankers. The stock was issued directly from the new corporation to Nelson. A stamp tax was paid on the transfer to the old corporation and on the transfer from the old corporation to Nelson. The govern-

ment asserted an additional tax on the supposed transfer from the old corporation to its stockholders. The taxpayer denies that the stockholders had the right to receive the stock. It does not deny that Nelson, as nominee, acquired the right to receive such stock.

In the *Automatic Washer* case and in the *Raybestos-Manhattan* case the question was whether or not the purported transferor had any right to receive the stock which it could transfer. In the instant case it is admitted that the respondent had the right to receive, and all other rights and interest, in the stock. Here, however, no transfer of title, right, or interest was made, the stock merely being taken by the respondent in the name of its nominee.

It is apparent that the petitioner's argument, advanced in the petition for certiorari in the *Automatic Washer* case, is not applicable here and that reference to it was made merely to inject into this proceeding the decision of the *Raybestos-Manhattan* case, which is equally inapplicable.

2. To sustain its contention as to the importance of the question involved, the petitioner, in the petition filed in the case of *United States* v. *Automatic Washer Company*, No. 330, states on page 11:

> "The question involved herein will continue to arise since the 1932 Revenue Act, Section 723, continues the same provision."

An examination of this provision of the Revenue Act of 1932, as amended, refutes this contention. As amended, the pertinent portion of Section 723 (a) of the Revenue Act of 1932, applicable to nominee cases, reads as follows:

> *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker *or his registered nominee* for sale, nor upon deliveries or transfers by a broker *or his registered nominee* to a customer for whom and upon whose order *the broker* has purchased same, *nor upon deliveries or transfers by*

a purchasing broker to his registered nominee if the shares or certificates so delivered or transferred are to be held by such nominee for the same purpose as if held by the broker, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts. * * * (Amendment indicated in italics.)

Section 723 of the Revenue Act of 1932 was made effective fifteen days after its enactment on June 6, 1932. The above quoted amendment was made on June 29, 1936, by virtue of Public No. 842, 74th Congress. The amendment to Section 723 does not change the effective date of that statute and it would appear that the effective date is that specified by Section 723 in the Revenue Act of 1932. It is patent that this amendment was specifically intended to avoid any possibility of the double tax, asserted herein, upon corporate brokers who are forced to act through individual nominees. To eliminate this issue from litigation the petitioner need only give effect to Section 723 (a) of the Revenue Act of 1932 as amended.

Owing to discrepancies in the corporation laws of the different states and to the difficulty of ascertaining corporate capacity and the authority of officers of corporations to make transfers, it has become necessary for corporate brokers to deal almost exclusively through individual nominees. The provision in the statute imposing a stamp tax on transfers of stock has been in force in language identical with Section 800, Title VIII, Schedule A (3), of the 1926 Act since 1918. Long prior to, and ever since, that date corporate brokers have consistently indulged in the practice of dealing through nominees. Judicial approval of a similar practice was given in the interpretation of a stamp tax act as early as 1902. *United States* v. *Clawson, et al.*, 119 Fed. 994. There a contention similar to that of the petitioner herein was advanced by the United States and rejected by the court.

From the first enactment of the stamp tax provision in its present form in 1918, up to recent years, the government has not deemed the question of sufficient importance to assert a tax in the thousands of transactions involving nominees. Its recent attempts to collect a double tax from corporate brokers has resulted in the precise issue involved herein being decided adversely to the petitioner in all of the following cases:

Union Trust Company v. *Heiner*, 26 Fed. (2d) 391 (W. D. Pa.), decided Feb. 8, 1928.

Dean v. *Caldwell and Company*, 9 Fed. Supp. 177 (M. D. Tenn.), decided March 19, 1934.

Field Glore and Company v. *United States* (N. D. Ill.), decided April 8, 1935.

Field Glore and Company v. *United States* (N. D. Ill.), decided April 8, 1935.

It is worthy of note that the government has not regarded the question of sufficient moment to justify the prosecution of an appeal in any of these cases. In view of the history of litigation upon the issue and the amendment of Section 723 of the Revenue Act of 1932, it cannot seriously be contended that the issue is of sufficient importance to warrant the granting of certiorari.

3. The petitioner, in support of its petition for certiorari, relies upon the case of *Founders General Corporation* v. *Hoey*, 84 Fed. (2d) 976 (C. C. A. 2). That case was decided upon its own peculiar set of facts and is not in conflict with the opinion below. In the *Founders General* case the appellant contracted to purchase certain shares of stock from the United States Electrical Power Corporation, to be delivered on September 17, 1929. Subsequent to that, but prior to the date set for delivery, appellant directed the seller to issue the securities in the name of Benton and Company and on that date the stock was so issued. Benton and Company was a partnership organ-

ized solely for the purpose of receiving stock in its name to be held for the Founders General Corporation. It did so pursuant to a formal contract and for this service it received an annual fee of $1,500.00. As set forth in the opinion, page 977, this contract provided that Benton and Company was appointed agent

> "for the limited purpose of holding in the firm name stocks, bonds, notes, and other securities and property as agent (other than commission agent or broker) for the account of the Corporation and of otherwise acting with respect thereto in accordance, but only in accordance with the written instructions of the Corporation. * * *"

It also provided that Benton and Company should have no beneficial interest in the securities so held, that it waived all right, title, and interest in any securities held or received by it, and that the Founders General Corporation was appointed the agent and attorney of Benton and Company with full power to sell, assign, endorse, transfer, and deliver such securities. The Power Corporation paid the stamp tax upon the issuance of the stock. The Commissioner asserted a transfer tax upon the supposed transfer from the Founders General Corporation to Benton and Company.

Benton and Company was not a bare nominee, as it was formally vested with certain rights. The Founders General Corporation did not merely take the stock in the name of Benton and Company, but the surrounding facts indicate that a transfer of an interest was contemplated and made. That they waived, by express provision, any right, title, or interest to the stocks so held would serve to indicate that it was contemplated by the Founders General Corporation that some interest would be transferred to Benton and Company. By virtue of the provision appointing the Founders General Corporation as agent of Benton and Company to sell, assign, and transfer the stocks they

recognized that Benton and Company was clothed with certain attributes of ownership which could be re-delegated. The sole business of Benton and Company, for which they received an annual compensation, was to receive and to hold shares of stock for the Founders General Corporation. All the formal requirements of a transfer of interest are present in this transaction.

None of these requirements are present in the instant case. There are no facts which would indicate that it was ever contemplated that any interest be transferred. There was no formal contract. Vercouter, the nominee, received no consideration for the use of his name. He waived no interest in the stock for the obvious reason that he acquired none to waive. The most that could be said is that the respondent used the name of Vercouter to effect the transfer. The use of the name "Vercouter" in receiving the stock is exactly the same as if the respondent had accepted it in the name of "A. B. Leach & Co." or "A. B. Leach & Co., Account No. 1." No different legal problem would be presented. Vercouter *was* A. B. Leach & Co.

This is obviously not the situation where the parties, as in the *Founders General Corporation* case, expressly provide by formal contract for the protection of the corporation's interest which they contemplated might be transferred.

That the court in the *Founders General Corporation* case did not deem it necessary to distinguish the case of *White* v. *Consolidated Equities, Inc.*, 78 Fed. (2d) 435 (C. C. A. 1), indicates that the *Founders General Corporation* case was decided solely upon its own unique set of facts.

This case is not within the principle announced in the *Raybestos-Manhattan* case, which decided the only important point not covered by the change in the stamp tax

provision of the Revenue Act. The issue involved herein can no longer arise since the amendment to the Revenue Act. The case is not in conflict with the *Founders General Corporation* case and is not of sufficient importance to warrant the granting of certiorari.

Wherefore it is respectfully submitted that the petition for a writ of certiorari be denied.

E. J. BLAIR,
GEORGE K. BOWDEN,
Attorneys for Respondent.

October 1, 1936.